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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOSEPH SCAFO

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case .

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-15a) is not yet reported. The Memorandum, Findings and Order of the district court (App. D, *infra*, pp. 24a-36a) is not reported. The initial opinion of the court of appeals vacating the judgment of conviction and remanding for additional

findings (Pet. App. C, *infra*, pp. 18a-23a) is reported at 470 F. 2d 748.

## JURISDICTION

The judgment of the court of appeals (App. B, *supra*, pp. 16a-17a) was entered on June 8, 1973. By order dated June 3, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari until July 25, 1973. On July 16, 1973, Mr. Justice Powell granted a further extension of time to file a petition for certiorari to August 7, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in the absence of express authorization by Congress, courts may validly dismiss lawful indictments, with prejudice, for delay in prosecution, where the delay does not violate the defendant's Sixth Amendment right to a speedy trial and where such a dismissal is contrary to Rule 48(b) of the Federal Rules of Criminal Procedure.

## STATUTES AND RULES INVOLVED

18 U.S.C. 3771 provides:

> The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or

plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

28 U.S.C. 332(d) provides:

Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

Rule 48(b) of the Federal Rules of Criminal Procedure provides:

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Rule 4 of the Second Circuit Rules Regarding the Prompt Disposition of Criminal Cases (28 U.S.C.A., Rules (Supp.), pp. 65-67)[1] provides:

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, Joseph Scafo was convicted of theft of goods which were part of a shipment in foreign commerce, in violation of 18 U.S.C. 659. He was sentenced to imprisonment for three years, all but four months of which were suspended, and was placed on probation for three years.

1. The material facts are not in dispute. On August 10, 1969, two cartons—one containing watches from Italy, the other pearls from Japan—were stolen

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[1] The Second Circuit Rules are set forth in their entirety in our petition for a writ of certiorari in a companion case. *Dooling* v. *Hilbert*, No. 72-1653, App. E, pp. 29a-34a. We are providing respondent with a copy of our petition in that case.

from a locked wire mesh cage for high value shipments in the American Airlines Cargo Terminal at John F. Kennedy International Airport in Queens, New York. On August 18, 1969, respondent Scafo, a Fleet Service Clerk at American Airlines, and Leonard Turano, a fellow employee, were arrested for the theft. They were arraigned before a United States Magistrate and released on their own recognizance.[2]

On July 28, 1971, respondent Scafo was indicted and on August 12, 1971, he pleaded not guilty. On that day in an oral motion, and the next day in a written motion, he moved to dismiss the indictment, pursuant to Rule 4 of Second Circuit Council Rules Regarding Prompt Disposition of Criminal Cases, which provides:

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

---

[2] Turano later pleaded guilty to possession of the proceeds of the theft.

The district court denied the motion to dismiss the indictment. As it later explained, it assumed that the six-month period began to run on January 5, 1971, the date on which the Speedy Trial Rules were promulgated, and it regarded the 24-day period of delay beyond the six-month period "as de minimis, coming at the outset of a new procedural regime" (App. D, *infra*, p. 25a).

On January 24, 1972, after a trial before a jury, respondent Scafo was convicted of thefts of goods which were part of a shipment in foreign commerce, in violation of 18 U.S.C. 659. The court of appeals, after rejecting Scafo's claims regarding the admissibility of certain hearsay evidence, vacated the judgment of conviction and remanded the case to the district court for further proceedings on Scafo's motion to dismiss the indictment pursuant to Rule 4 of the Speedy Trial Rules (App. C, *infra*, pp. 18a-23a). The remand was held to be necessary because the district court had made no specific finding respecting the cause of the delay in prosecution and the court of appeals was unable to determine whether "exceptional circumstances" were present which excused the delay.[3]

2. On January 18, 1973, after conducting an evidentiary hearing, the district court denied the motion to dismiss the indictment. The court concluded that "[t]he one and a half years which intervened between the arrest and the date of the Speedy Trial

[3] Rule 5(h) of the Speedy Trial Rules excludes from computation of the six-month period delay occasioned by "exceptional circumstances."

Rules [January 5, 1971] do not show a violation of defendant's constitutional right to a speedy trial and need not be counted" (App. D, *infra*, p. 32a). Since "[t]he indictment was well within the five-year period permitted by the statute of limitations" (18 U.S.C. 3282), the delay afforded no basis for dismissing the indictment on this ground (App. D, *infra*, p. 32a).

While the indictment was not returned until 6 months and 24 days following the promulgation of the Speedy Trial Rules, the district court found that there were "exceptional circumstances" to excuse the 24-day delay beyond the six-month period (App. D, pp. 35a-36a):

> 1. That the charges against defendant Joseph Scafo and Leonard Turano were reassigned to Assistant United States Attorney Pattison on about March 17, 1971.
>
> 2. That the delay of a little more than two months after January 5, 1971 [the date on which the Prompt Disposition Rules were announced] in making the reassignment was caused by exceptional circumstances, namely, the impact of the new Rules and the resignation of the Assistant who previously had the case, and that this period should be excluded from the six-months computation.
>
> 3. That a reasonable period to explore the possibility of a guilty plea by defendant Scafo should be excluded from the six-months computation; and in this case, that a period of one month should be allowed for that purpose.
>
> 4. That a reasonable period to prepare the government's case should also be excluded, particularly in view of (a) the importance of Leon-

ard Turano's testimony for the government, (b) his assertion of fears which deterred him from cooperating, and (c) the necessity of reaching a judgment as to whether it was sound policy to let him plead guilty to a misdemeanor; and that a period of at least sixty days should be allowed for this purpose.

5. That all the periods mentioned should be treated as excusable delay, occasioned by exceptional circumstances, outside the six-month period.

6. That the delays in prosecution did not prejudice the defendant.

The district court also held that the failure of the government to be ready for trial by July 5, 1971, the effective date of the Speedy Trial Rule, did not automatically warrant dismissal under Rule 4 (App. D, pp. 34a-35a):

> While the Judicial Council said that the period from January 5 to July 5, 1971 "should provide sufficient time for the United States Attorneys to determine which cases should be reached for trial and which cases should be discontinued," this statement should not prevent a showing of the need for more time in individual cases.
>
> In view of the many offenses committed at John F. Kennedy International Airport, this court does not consider it in the public interest to dismiss charges of theft at the airport unless they are truly trivial or the delays are clearly inexcusable or there has been real prejudice to the defendant as a result of the delay.

On January 29, 1973, the district court entered a new judgment of conviction and resentenced Scafo to the

same terms as originally imposed on March 24, 1972.

5. On June 8, 1973, the court of appeals vacated the judgment of conviction and remanded the case to the district court with directions to dismiss the indictment (Pet. App. A, *infra*, pp. 1a-15a). The court of appeals held that the six-month period from January 5, 1971, when the Speedy Trial Rules were promulgated, until July 5, 1971, when the Speedy Trial Rules were to take effect, was intended to permit the offices of the United States Attorneys in the Circuit "to prepare certain of their cases for prompt trial, and otherwise to dispose of those cases considered less worthy of the limited resources of personnel, money and time available to the offices" (App. A, *infra*, p. 10a). Accordingly, all cases which were more than six months old by July 5, 1971, and were not ready for trial on that date would have to be dismissed unless there were periods of delay occasioned by "exceptional circumstances" which, when subtracted from the overall period of delay, reduced the delay to less than six months. Since the period of delay occasioned by "exceptional circumstances" here—assuming the validity of the district court's determination of this issue was correct—only involved the last six months of the two-year period, "the government would still be wide of the mark of complying with the six-month readiness period prescribed by Rule 4" (App. A, *infra*, pp. 13a-14a).

The court of appeals also held that the district court misapprehended the test of what constitutes readiness for trial under Rule 4—a matter which it considered

important to the administration of the Rules. The court of appeals explained that the relevant period of delay was not, as the district court's opinion implied, between arrest and indictment. Since the filing of an indictment does not necessarily indicate that the government is ready for trial, the court explained, it is necessary that the government transmit a notice of readiness for trial, which it had not done here (App. A, *infra*, pp. 14a-15a).

## REASONS FOR GRANTING THE WRIT

1. Although the opinion of the court of appeals was concerned with a narrow issue of construction of Rule 4—*i.e.*, the precise time limits within which to compute the delay period therein prescribed—the basic issue presented is whether a court may properly dismiss an indictment because of pre-trial or pre-indictment delays which do not violate the Speedy Trial Clause of the Sixth Amendment or prejudice the defendant in any way.[4] The same issue is posed in *Hilbert* v. *Dooling*, 476 F. 2d 355 (C.A. 2), where the Solicitor General has filed a petition for certiorari on behalf of United States District Judge John F. Dooling, Jr. (No. 72-1653). There the court of appeals held that the dismissal of an indictment with

[4] This case was argued and decided after the court of appeals, sitting *en banc*, had construed the Speedy Trial Rules to compel a mandatory dismissal and sustained their validity. *Hilbert* v. *Dooling*, 476 F. 2d 355 (C.A. 2), petition for certiorari pending, No. 72-1653. The issue was therefore not directly raised again when the appeal in the instant case was heard by the court of appeals.

prejudice, under Rule 4 of the Circuit Council Speedy Trial Rules, is a mandatory and appropriate remedy for inadvertent delays in indictments and trials which do not prejudice the defendant or violate the Speedy Trial Clause.

The petition for a writ of certiorari in that case, upon which we principally rely, shows that the issues raised here—whether the Speedy Trial Rules promulgated by the Circuit Council were authorized by 28 U.S.C. 332(d) and, if so, whether the rule providing for a mandatory dismissal with prejudice is an appropriate remedy—are substantial and important to the administration of justice.

2. The issue whether a dismissal of an indictment is the appropriate remedy for pre-trial delays which do not prejudice the defendant or violate the Speedy Trial Clause is one over which there is a conflict among the courts of appeals and between the plans adopted by all of the district courts outside the Second Circuit, pursuant to Fed.R.Crim.P. 50(b), and the districts comprising the Second Circuit (Dooling Pet. 19-23).[5] The recent opinion of the Court in *Strunk* v.

[5] The Speedy Trial Rules promulgated by the Circuit Council were repealed effective April 1, 1973, upon the adoption of similar rules by the district courts pursuant to Rule 50(b) (See Dooling Pet. 21-24). The adoption of the Rule 50(b) plans by the district courts in the Second Circuit has not undermined the significance of the issue whether, assuming the power to promulgate generally rules regarding the prompt disposition of criminal cases, a rule mandating dismissal of an indictment with prejudice, which was not expressly authorized by Congress, is an appropriate remedy for pre-trial delays which do not violate the Speedy Trial Clause and do

*United States*, No. 72-5521, decided June 11, 1973, indicates that the Speedy Trial Rules at issue here are also inconsistent with the approach of this Court. There the Court reaffirmed the view that a dismissal for delay in prosecution was an "unsatisfactorily severe remedy" (*Barker* v. *Wingo*, 407 U.S. 514, 522) and was justified in the case of a violation of the Speedy Trial Clause because "such severe remedies are not unique in the application of constitutional standards." *Strunk* v. *United States*, No. 72-5521, decided June 11, 1973, slip op. p. 6.

Such remedies are, however, unique and unprecedented where there has been no violation of a defendant's rights under the Constitution or statute. On the contrary, as we have shown in the petition in *Dooling*, under Fed.R.Crim.P., Rule 48(b), which has the force and effect of statute (18 U.S.C. 3771), and which grants a district court discretion to dismiss for "unnecessary" delay in prosecution, it would have been an abuse of discretion to dismiss the indictment in this case (Dooling Pet. 19).

3. The issue raised here is of immediate practical concern. The holding of the court of appeals that a notice of readiness is an essential prerequisite to com-

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not prejudice the defendant's right to a fair trial (Dooling Pet. 21-24). Moreover, the issue regarding the nature of the powers of the Circuit Council under 28 U.S.C. 332(d) is one of recurring importance. See e.g., *Chandler* v. *Judicial Council of the Tenth Circuit*, 398 U.S. 74; *In the Matter of Imperial "400" National, Inc.* v. *Nolan*, Nos. 72-1566 and 72-1290 (C.A. 3) decided April 23, 1973, petition for certiorari pending (No. 73-204).

pliance with both the Circuit Council Rules and the newly promulgated Rule 50(b) plans (Pet. App. A, *infra*, p. 14a) will affect approximately 271 cases in the Eastern District of New York, where until recently it was not the uniform practice of the United States Attorney's Office to file a notice of readiness. Such notices are not mandated by any provision of the Speedy Trial Rules and, under the individual assignment system prevailing in the Eastern District of New York, it was the responsibility of the judge to whom the case was assigned to direct proceedings after indictment and set the case down for trial. Under these circumstances, the United States Attorney justifiably did not believe that a notice of readiness was necessary.

The likelihood of a dismissal with prejudice will encourage numerous motions by defendants who took no action to demand a speedy trial (the failure to make such demand is of no significance under the rules)[6] that will involve numerous time consuming hearings[7] and which may ultimately result in freeing

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[6] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 8 (Dooling, Pet. App. E, p. 33a); Rule 50(b) *Plan For Achieving Prompt Disposition of Criminal Cases*, Rule 7 (Dooling Pet. App. F, p. 48a).

[7] In discussing the nature of the hearing held here, the district court observed (Pet. App. D, *infra*, p. 25a, n.):

> The hearing directed by the Court of Appeals took about two hours. Preparation for the hearing, study of the record and briefs, and drafting and revision of this memorandum and findings required in the aggregate more than another full court day, while decision of civil matters was delayed.

scores of defendants for reasons wholly unrelated to their guilt or innocence or their ability to obtain a fair trial.

While the basic issue raised here is similar to that in *Dooling* v. *Hilbert*, No. 72-1653, we urge that if certiorari is granted in that case the petition should likewise be granted here and that the cases be consolidated for hearing. The petition in *Dooling* raises a threshold issue regarding the propriety of the use of a writ of mandamus to obtain appellate review of a pretrial order denying a motion to dismiss an indictment. Thus *Dooling* could be decided on that ground without reaching the merits of the speedy trial issue. The consolidation of these cases for argument would place both issues directly before the Court.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

HENRY E. PETERSEN,
*Assistant Attorney General.*

JEROME M. FEIT,
HARVEY M. STONE,
*Attorneys.*

AUGUST 1973.

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 868—SEPTEMBER TERM, 1972

(Argued May 7, 1973 Decided June 8, 1973)

Docket No. 73-1163

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UNITED STATES OF AMERICA, APPELLEE

*v.*

JOSEPH SCAFO, APPELLANT

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Before:

SMITH, MULLIGAN and TIMBERS,
*Circuit Judges*

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Appeal from (1) a judgment of conviction after jury trial entered January 29, 1973 in the Eastern District of New York, John F. Dooling, Jr., *District Judge*, on one count of stealing goods which were part of a foreign shipment, in violation of 18 U.S.C. § 659 (1970), and from (2) an order entered January 19, 1973 by Orrin G. Judd, *District Judge*, denying appellant's motion to dismiss the indictment because of the government's failure to comply with the

Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 28 U.S.C.A. App. (Supp. 1973), said judgment and order having been entered following remand by this Court on prior appeal. 470 F.2d 748 (2 Cir. 1972).

Order denying motion to dismiss indictment reversed; case remanded with instructions to vacate judgment of conviction and to dismiss indictment.

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CONRAD F. FERRIGNO, New York, N.Y. (David M. Markowitz, New York, N.Y., on the brief), *for Appellant.*

THOMAS R. PATTISON, Asst. U.S. Atty., Brooklyn, N.Y. (Robert A. Morse, U.S. Atty., L. Kevin Sheridan and Raymond J. Dearie, Asst. U.S. Attys., Brooklyn, N.Y., on the brief), *for Appellee.*

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TIMBERS, *Circuit Judge:*

This is another in a series of recent cases in our Court involving application of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. 28 U.S.C.A. App. (Supp. 1973).[1]

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[1] See, e.g., *United States* v. *Cuomo*, —— F.2d —— (2 Cir. 1973), slip op. 3863 (May 31, 1973) (motion to dismiss denied; judgments of conviction vacated); *United States* v. *Fernandez*, —— F.2d —— (2 Cir. 1973), slip op. 3697 (May 23, 1973) (denial of motion to dismiss affirmed; judgment of conviction reversed on other grounds); *United States* v.

The narrow issue on this appeal is whether, in computing the six-month period within which the government must be ready for trial pursuant to Rule 4 of the Prompt Disposition Rules, such period begins on the *date of arrest* or on the *date of promulgation* of the Prompt Disposition Rules. We hold, in accordance with the plain language of Rule 4 itself, that

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*Pierro*, —— F.2d —— (2 Cir. 1973), slip op. 3487 (May 9, 1973) (order dismissing indictment vacated); *United States* v. *Boatner*, —— F.2d —— (2 Cir. 1973), slip op. 3307 (May 4, 1973) (denial of motion to dismiss and judgment of conviction affirmed); *United States* v. *Nathan*, —— F.2d —— (2 Cir. 1973), slip op. 2361 (March 16, 1973) (denial of motion to dismiss and judgments of conviction affirmed); *United States* v. *Rollins*, —— F.2d —— (2 Cir. 1973), slip op. 2279 (March 13, 1973) (order dismissing indictment vacated); *Hilbert* v. *Dooling*, —— F.2d —— (2 Cir. 1973) (en banc), slip op. 2191 (March 12, 1973) (mandamus directing dismissal of indictment); *United States* v. *Pollak*, 474 F.2d 828 (2 Cir. 1973) (remanded for further findings on motion to dismiss); *United States* v. *Infanti*, 474 F.2d 522 (2 Cir. 1973) (denial of motion to dismiss affirmed; one judgment of conviction affirmed, one reversed on other grounds); *United States* v. *Valot*, 473 F.2d 667 (2 Cir. 1973) (remanded for further findings on motion to dismiss); *United States* v. *Strayhorn*, 471 F.2d 661 (2 Cir. 1972) (denial of motion to dismiss and judgment of conviction affirmed); *United States* v. *Counts*, 471 F.2d 422 (2 Cir. 1973) (denial of motion to dismiss and judgments of conviction affirmed); *United States* v. *Scafo*, 470 F.2d 748 (2 Cir. 1972) (remanded for further findings on motion to dismiss); *United States* v. *Pacelli*, 470 F.2d 67 (2 Cir. 1972) (denial of motion to dismiss and judgment of conviction affirmed); *United States* v. *Singleton*, 460 F.2d 1148 (2 Cir. 1972) (denial of motion to dismiss and judgment of conviction affirmed).

See generally Comment, *Speedy Trials and The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases*, 71 Colum. L. Rev. 1059 (1971).

the six-month period begins with the date of arrest.

Joseph Scafo appeals from (1) a judgment of conviction after jury trial entered January 29, 1973 in the Eastern District of New York, John F. Dooling, *District Judge*, on one count of stealing goods which were part of a foreign shipment, in violation of 18 U.S.C. § 659 (1970), and from (2) an order entered January 19, 1973 by Orrin G. Judd, *District Judge*, denying appellant's motion to dismiss the indictment because of the government's failure to comply with the Prompt Disposition Rules.

Both the judgment and order now appealed from were entered following remand by this Court on a prior appeal, *United States* v. *Scafo*, 470 F.2d 748 (2 Cir. 1972), when we vacated the original judgment of conviction and ordered the district court to make findings more specific than it had made in denying a previous motion to dismiss for failure to comply with the Prompt Disposition Rules.

Upon remand, Judge Judd did make specific findings of fact on the motion to dismiss, and again denied the motion. Also in accordance with our remand, Judge Dooling thereafter entered a new judgment of conviction. It is from Judge Judd's second order denying the motion to dismiss and from the new judgment of conviction that the instant appeal has been taken.

For the reasons below, we reverse the order denying the motion to dismiss the indictment, and we remand the case to the district court with instructions to vacate the judgment of conviction and to dismiss the indictment.

## I.

A brief summary of prior proceedings in this case is necessary to an understanding of our decision.

On August 10, 1969, two cartons—one containing watches from Italy, the other pearls from Japan—were stolen from a locked wire mesh cage for high value shipments in the American Airlines Cargo Terminal at John F. Kennedy International Airport, Queens, New York.

On August 18, 1969, appellant Scafo and one Leonard Turano, both employees of American Airlines, were arrested and charged with the theft of the two cartons. They were arraigned before a United States Commissioner, waived preliminary hearing, and were released on their own recognizances.

For a period of nearly two years, the case remained dormant—until July 28, 1971 when Scafo was indicted.

On August 12, 1971, Scafo was arraigned before Judge Judd. He pleaded not guilty. On that date in an oral motion, and on the following day in a written motion, he moved to dismiss the indictment because of the failure of the government to comply with the Prompt Disposition Rules. A hearing was held before Judge Judd on August 20, at which time the motion was denied in open court.

Following a pretrial conference before Judge Dooling on November 22, 1971, Scafo was tried before Judge Dooling and a jury beginning January 21, 1972. After a three day trial, the jury returned a

verdict of guilty as charged. On March 24, 1972, he was sentenced to a three year prison term, all but four months of which was suspended, and was ordered on probation for three years. He has been enlarged on his own recognizance pending appeal.[2]

On the first appeal, the principal issue was the propriety of Judge Judd's denial of Scafo's motion to dismiss the indictment for failure to comply with the Prompt Disposition Rules.[3] In an opinion filed December 20, 1972, we vacated the judgment of conviction and remanded for a hearing and further findings on the motion to dismiss. 470 F.2d at 751. After noting that the government had argued that a number of "exceptional circumstances" justified a period of delay within the meaning of Rule 5(h) of the Prompt Disposition Rules, and that Judge Judd apparently had concluded that the government had satisfied its burden under the Rules, we concluded that "the details of [the 'exceptional circumstances'] were not developed at the hearing, and Judge Judd made

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[2] Apparently some time after his arrest on August 18, 1969—we are not told when—Turano pleaded guilty to a charge of possession of the proceeds of the theft. *United States* v. *Scafo*, *supra*, 470 F.2d 750 n. 2. We have not been informed as to the disposition of Turano's case.

For further details of the evidence adduced at Scafo's trial, see our earlier opinion. 470 F.2d at 749-50.

[3] He also raised a question of the admissibility of certain hearsay testimony. As to this, we held that, even if error had been committed, "[i]n view of the overwhelming evidence of Scafo's guilt, [such error] was clearly harmless error." 470 F.2d at 750.

no findings of fact as to what actually occurred and the delay or delays excused thereby." 470 F.2d at 750.

Upon remand, in accordance with our directions, Judge Judd promptly held a further hearing on January 4, 1973. Additional evidence was taken, including testimony by counsel for Scafo and counsel for the government. In a memorandum opinion filed January 19, 1973, Judge Judd, after summarizing the prior proceedings, the evidence and the applicable law, made the following findings of fact:

> "1. That the charges against defendant Joseph Scafo and Leonard Turano were reassigned to Assistant United States Attorney Pattison on about March 17, 1971.
>
> 2. That the delay of a little more than two months after January 5, 1971 [the date on which the Prompt Disposition Rules were announced] in making the reassignment was caused by exceptional circumstances, namely, the impact of the new Rules and the resignation of the Assistant who previously had the case, and that this period should be excluded from the six-months computation.
>
> 3. That a reasonable period to explore the possibility of a guilty plea by defendant Scafo should be excluded from the six-months computation; and in this case, that a period of one month should be allowed for that purpose.
>
> 4. That a reasonable period to prepare the government's case should also be excluded, particularly in view of (a) the importance of Leonard Turano's testimony for the government, (b)

his assertion of fears which deterred him from cooperating, and (c) the necessity of reaching a judgment as to whether it was sound policy to let him plead guilty to a misdemeanor; and that a period of at least sixty days should be allowed for this purpose.

5. That all the periods mentioned should be treated as excusable delay, occasioned by exceptional circumstances, outside the six-months period.

6. That the delays in prosecution did not prejudice the defendant." [4]

Judge Judd concluded that these various periods of excusable delay brought the government within the six-months period permitted by the Prompt Disposition Rules. He held that there had been no violation of those Rules. He denied the motion to dismiss the indictment.

Pursuant to our instructions,[5] Judge Judd referred the case to Judge Dooling for resentencing. On January 29, 1973, Judge Dooling resentenced Scafo, imposing the same sentence as originally imposed on March 24, 1972, and entered a new judgment of conviction.

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[4] This last finding would be of significance only with respect to Scafo's constitutional speedy trial claim. No such claim has been raised on appeal.

[5] "The district court should make findings of fact on the issues. If the district court finds, after taking such additional evidence as may be relevant, that the motion should be denied, it shall enter new final judgment based upon the record as supplemented by further testimony and findings, thereby preserving to the appellant his right to further appellate review." 470 F.2d at 751.

The instant appeal is from Judge Judd's order of January 19, 1973 denying the motion to dismiss the indictment and from the new judgment of conviction entered January 29, 1973. On this appeal, appellant has focused on whether the district court erred in finding that the reasons for the delay asserted by the government satisfied the "exceptional circumstances" provision of Rule 5(h). We find it unnecessary to determine the sufficiency under the Rules of each of the reasons asserted. We hold that, regardless of those reasons, the government failed to comply with the Rules, and the indictment must be dismissed.

The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases were promulgated on January 5, 1971, to take effect on July 5, 1971.[6] The essential construction problem before us on this appeal is whether, when the Circuit Council noted in its Statement accompanying the Rules that "[t]he rules are designed to apply equally to all cases now pending as well as to all cases commenced in the future", it meant that on July 5, 1971 all cases six months or older would be subject to the full effect of the

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[6] The Prompt Disposition Rules have since been superseded by plans promulgated by the various district courts within the circuit, and approved by the Judicial Council, in accordance with Fed. R. Crim. P. 50(b). Those plans became effective April 1, 1973. Nevertheless, unlike certain other problems left open by the Prompt Disposition Rules but settled in the Rule 50(b) plans, see, e.g., *Hilbert* v. *Dooling*, —— F.2d ——, —— n. 2 (2 Cir. 1973), slip op. 2191, 2193 n. 2 (March 12, 1973) (en banc), it is possible that the issue on the instant appeal may recur under the new formulations, although with the passage of time this will become increasingly unlikely.

Rules, or rather that on July 5, 1971 all cases pending as of January 5, 1971 would be deemed to have had their first relevant prosecutorial act[7] on January 5. The result in this case turns on which of these alternative interpretations is correct: if the former, the relevant period of delay would be computed from August 18, 1969 (date of arrest); if the latter, the period of delay would be computed from January 5, 1971 (date of promulgation of Rules).

During the short life of the Rules, there has been a paucity of reported decisions dealing with pre-1971 cases. This suggests that the offices of the United States Attorneys in the Circuit made good use of the six-month grace period before the effective date to prepare certain of their cases for prompt trial, and otherwise to dispose of those cases considered less worthy of the limited resources of personnel, money and time available to the offices. What is important to remember is that this was exactly the purpose of the delay in implementing the Rules[8]—and not, as

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[7] Rule 4 provides that "[i]n all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest."

[8] "The six-month period before the rules become operative should provide sufficient time for United States Attorneys to determine which cases should be reached for trial and which cases should be discontinued, since the need for such action has already been brought to their attention on numerous occasions. The six-month period also permits the Council to consider any further suggestions regarding the content of the rules." Statement of the

the assumption below seems to have been, to provide for a blanket commencement of the six-month period specified in Rule 4 to begin January 5. Indeed, it may be surmised that it was no more than coincidence that both Rule 4 and the post-announcement buffer specified identical periods of six months.[9] The key appears to lie in the language of the Circuit Council's Statement quoted above—that the Rules are to apply *equally* to cases pending on January 5, 1971 and to those commenced thereafter. We are unable to read that language to mean that for a case pending on January 5 a delay in prosecution from August 18, 1969 can be totally ignored.

The few reported decisions which have involved a similar chronology have agreed, some by implication. In *United States* v. *Counts*, 471 F.2d 422 (2 Cir. 1973), the defendant was indicted on December 3, 1970, and trial did not commence until April 10, 1972. We referred to this as a "delay of 16 months", but held that, since the government had filed a notice

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Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 28 U.S.C.A. App. (Supp. 1973).

[9] A preliminary draft of the Prompt Disposition Rules originally specified a delay of ninety days, rather than six months, from the date of promulgation to the effective date. The ensuing discussion of the draft resulted in a general agreement that ninety days might not be sufficient time for the offices of the United States Attorneys to prepare for the effective date. Accordingly, the gestation period was increased to six months. This would suggest that the Circuit Council intended no Rule 4-type impact to be afforded the pre-July 5, 1971 grace period before the Rules became effective.

of readiness for trial before the effective date of the Rules and in fact was ready for trial at all relevant times, no violation of the Rules had occurred. See also *United States* v. *Nathan*, —— F.2d ——, —— (2 Cir. 1973), slip op. 2361, 2368-69 (March 16, 1973) (arrest June 1970, indictment August 1970, trial June 1972; government ready for trial June 1971); *United States* v. *Infanti*, 474 F.2d 522, 527-29 (2 Cir. 1973) (chronology similar to that in instant case; claim under Rules rejected because not raised below). In our opinion on the prior appeal in the instant case, the point was made quite directly:

> "The rules were promulgated on January 5, 1971, with an effective date of July 5, 1971. They applied to cases pending and to those to be commenced in the future. Since Scafo was not indicted until July 28, 1971, this case was fully subject to the new rules. Unless saved by an exception to the Rules, *the nearly two year delay between the arrest and the indictment clearly violated Rule 4*, which requires the Government to be ready for trial within six months of the date of the arrest." 470 F.2d at 750 (emphasis added).

Early in the history of the Rules, moreover, the office of the United States Attorney for the Eastern District of New York argued that it was the intent of the Circuit Council, with respect to cases pending as of the July 5, 1971 effective date, that the six-month period specified in Rule 4 should begin to run on July 5. That contention was squarely rejected by the

District Court for the Eastern District of New York on October 8, 1971:

> "This construction . . . is contrary to the clear mandate of the Second Circuit that on the effective date the provisions of the Criminal Case Rules, including the six-month readiness requirement of rule 4, are applicable to all pending cases. The Second Circuit underscored its intent by instructing the Government's attorneys to use the six-month period between promulgation and effective date 'to determine which cases should be reached for trial and which cases should be discontinued.'" *United States* v. *Kaye*, 334 F. Supp. 326, 328 (E.D.N.Y. 1971) (emphasis deleted).

The underlying premise of these cases is that the January 5, 1971 promulgation date has no bearing on the computation of any period of delay. The six-month delay between the promulgation date and the effective date was intended solely as a buffer period. It was not meant to imply that, in all cases pending on January 5, 1971, the period of delay should be computed from that date. This is consistent with the plain language of the Rules and the Circuit Council's Statement appended thereto.

We hold that the appropriate period within which the government was required to be ready for trial should have been computed from August 18, 1969, the date of arrest. This being so, even if we were to accept Judge Judd's findings that the various periods of delay on the part of the government were occasioned by exceptional circumstances, the government

would still be wide of the mark of complying with the six-month readiness period prescribed by Rule 4.

Since we find that the government clearly violated the Prompt Disposition Rules, we hold that the district court erred in denying the motion to dismiss the indictment.

## III.

In view of its importance in the administration of the Prompt Disposition Rules (as well as the district court Rule 50(b) plans, see note 6, *supra*), we think it is appropriate to direct attention to what appears to have been the district court's misapprehension of what constitutes the government's readiness for trial. This focuses upon the other end of the period of delay relevant to the evaluation of a motion to dismiss under the Prompt Disposition Rules.

Throughout its opinion, the district court speaks of the period of delay between the arrest and *indictment* of Scafo. Nowhere did the court find, or indeed even question, that the government was in fact *ready for trial* on the date the indictment was returned. There is no presumption that having sufficient evidence to warrant an indictment is necessarily an indication that the government is ready for trial within the meaning of Rule 4. For aught that appears in this record, no notice of readiness, either formal or informal, was ever transmitted to either the district court or the defendant prior to the time of the trial.[10]

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[10] While a pretrial conference was held on November 22, 1971, there is no indication that the government stated its readiness for trial even at that time.

As we recently have stated, "under Rule 4 the Government must communicate its readiness for trial to the court *in some fashion* within the six-month period, as extended pursuant to Rule 5." *United States* v. *Pierro*, —— F.2d ——, —— (2 Cir. 1973), slip op. 3847, 3492 (May 9, 1973) (emphasis added). Nothing in the instant case suggests that the court at any time was so informed. We are unwilling to accept the view that the filing of an indictment, even after a delay of two years, is enough to satisfy the government's burden referred to in *Pierro*.

Finally, in view of our holding above, we do not reach the merits of appellant's objections to the district court's findings that the reasons for delay asserted by the government satisfied the "exceptional circumstances" provision of Rule 5(h). While we have serious doubts as to the sufficiency of certain of the reasons for delay asserted by the government, we believe, in view of our holding above, that such issues are best left for another day.

Reversed and remanded with instructions to vacate the judgment of conviction and to dismiss the indictment.

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of June, one thousand nine hundred and seventy-three.

Present: HON. J. JOSEPH SMITH
HON. WILLIAM H. MULLIGAN
HON. WILLIAM H. TIMBERS
Circuit Judges,

73-1163

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

JOSEPH SCAFO, DEFENDENT-APPELLANT

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said Distirct Court be and it hereby is denying the motion to dismiss the indictment be and it hereby is reversed

and that the action be and it hereby is remanded to said District Court with instrutcions to vacate the judgment of conviction and to dismiss the indictment in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

## APPENDIX C

UNITED STATES OF AMERICA, APPELLEE

*v.*

JOSEPH SCAFO, DEFENDANT-APPELLANT

No. 329, Docket 72-1891

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

Argued Nov. 2, 1972

Decided Dec. 20, 1972

Defendant was convicted in the United States District Court for the Eastern District of New York, John F. Dooling, Jr., J., after jury trial, of stealing goods in foreign commerce. Defendant appealed. The Court of Appeals, Lumbard, Circuit Judge, held that where the government maintained, on defense motion to dismiss for failure to comply with "prompt disposition" rules, that part of the delay was due to negotiations upon a possible guilty plea and that some delay was caused by attempts to secure cooperation of a person arrested on the same day as defendant and charged with the same crime, but the trial judge made no findings of fact as to what actually occurred and the delay or delays excused thereby, it was impossible upon appeal to review the propriety of the denial of the motion.

Remanded for further proceedings, with instructions.

Thomas R. Pattison, Asst. U.S. Atty. Robert A. Morse, U.S. Atty. for Eastern District of New York, and L. Kevin Sheridan, Asst. U.S. Atty., on the brief), for appellee.

David M. Markowitz, New York City, (Conrad F. Ferrigno, New York City, on the biref), for appellant.

Before LUMBARD, FEINBERG and OAKES, Circuit Judges.

LUMBARD, *Circuit Judge*:

Joseph Scafo, appeals from his conviction for stealing goods in foreign commerce in violation of 18 U.S.C. § 659. His principal claim of error is the district court's denial of his motion to dismiss for failure of the Government to be ready for trial within the time required by the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. 28 U.S.C.A. (Supp. 1972).

On Sunday, August 10, 1969, two cartons containing watches and pearls were taken from a locked wire mesh cage for high value shipments in the American Airlines Cargo Terminal at John F. Kennedy International Airport in Queens.[1] Defendant Joseph Scafo, a Fleet Service Clerk at American Airlines, was arrested for the theft on August 18, 1969. He was indicted nearly two years later on July 28, 1971.

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[1] Edward Naglitsch, a supervisor with American Airlines, testified at trial that when he inventoried the cage at 8:00 a.m. on August 10, 1969, everything was accounted for, but that at 2:00 p.m., when another inventory was taken, the two cartons were missing.

Scafo was convicted after a three day jury trial in the Eastern District (John F. Dooling, Jr., J.) commencing January 21, 1972. He was sentenced to three years of imprisonment, all but four months of which were suspended, and to three years of probation.

At his arraignment on August 12, 1971, Scafo moved orally before Judge Judd to dismiss the indictment for failure to comply with the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. Judge Judd denied the motion without prejudice to renewal on formal written papers. By Notice of Motion dated August 13, 1971, the defense again moved for dismissal. After a hearing on August 20, 1971, Judge Judd denied this motion.

At the trial Anthony DiDonna, a cargo handler for American Airlines, testified that while he was at work on Sunday morning, August 10, 1969, he observed Leonard Turano, a supervisor with American Airlines, remove several packages from the high value cage and place them on the floor; he then saw Joey Scafo take the packages outside. The prosecution also called Leonard Turano. He testified that on the Sunday morning in question Scafo had tried to enlist him in a scheme to "hit the cage," but that he (Turano) had ignored this request. Just before lunch, Turano entered the Cargo Terminal from outside where he had been working and saw Scafo at the cage; "mortified" and "shocked," Turano walked away. However, changing his mind a few minutes later, Turano came back and saw that the cage was closed and that there

were two packages on the floor. As Scafo picked them up, one dropped, and Turano picked it up and gave it to Scafo. The next day Scafo gave Turano $850.[2]

Scafo testified in his own defense and denied any knowledge of or complicity in the theft.

Scafo claims that the admission of certain hearsay testimony by Anthony DiDonna was error. DiDonna testified that, after lunch on Sunday, Turano asked him whether he had seen anyone at the cage that morning. When DiDonna answered, "just you and Joe," Hurano responded, "don't say that, you know." Scafo argues that this statement was improperly admitted under the res gestae exception to the hearsay rule. Leonard Turano during his own testimony repeated substantially the same conversation without objection.

[1] Whether or not this conversation between DiDonna and Turano should have been excluded, we believe no reversible error was committed. In view of the overwhelming evidence of Scafo's guilt, testimony regarding the conversation between DiDonna and Turano was clearly harmless error. If the jury believed DiDonna and Turano, as certainly the jury must have, the conversation added nothing to the strong case the Government presented.

[2] Scafo's major contention is that his pre-trial motion to dismiss the indictment for failure to comply with this Circuit's "Prompt Disposition" rules should

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[2] Both Scafo and Turano were arrested on August 18, 1969, and charged with the crime. Turano later pleaded guilty to a charge of possession of the proceeds of the theft.

have been granted. The rules were promulgated on January 5, 1971, with an effective date of July 5, 1971. They applied to cases pending and to those to be commenced in the future. Since Scafo was not indicted until July 28, 1971, this case was fully subject to the new rules. Unless saved by an exception to the Rules, the nearly two year delay between the arrest and the indictment clearly violated Rule 4, which requires the Government to be ready for trial within six months of the date of the arrest.[3]

In its papers opposing the defense motion to dismiss and at the hearing before Judge Judd, the Government maintained that part of the delay was due to negotiations between the prosecutor and defense counsel about a possible guilty plea by defendant Scafo;[4] it also maintained that some of the delay was caused by attempts to secure Turano's cooperation in the case. Turano did not testify before the grand jury until July 28, 1971, the very day the grand jury indicted Scafo. The Government argues that such negotiations constituted an "exceptional circumstance" justifying a "period of delay" within

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[3] 4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. . . .

[4] From the affidavits submitted on the motion to dismiss, it appears that the prosecutor and the defense counsel had at least three telephone conversations between March, 1971, and July, 1971, with regard to the disposition of this case.

the meaning of Rule 5(h).[5] However, the details of these conversations were not developed at the hearing, and Judge Judd made no findings of fact as to what actually occurred and the delay or delays excused thereby. Thus, it is impossible for us to review the propriety of Judge Judd's denial of the defense motion. Accordingly, we vacate the judgment of the district court and remand the case for further hearing on the motion to dismiss for failure to comply with the Rules Regarding Prompt Disposition of Criminal Cases.

The district court should make findings of fact on the issues. If the district court finds, after taking such additional evidence as may be relevant, that the motion should be denied, it shall enter new final judgment based upon the record as supplemented by further testimony and findings, thereby preserving to the appellant his right to further appellate review.

On the other hand, if the motion is granted, the indictment should be dismissed.

Remanded for further proceedings.

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[5] 5. In computing the time within which the government should be ready for trial under rules 3 and 4, the following periods should be excluded:

* * * *

(h) Other periods of delay occasioned by exceptional circumstances.

## APPENDIX D

## UNITED STATES DISTRICT COURT
## EASTERN DISTRICT OF NEW YORK

71-CR-869

UNITED STATES OF AMERICA

— against —

JOSEPH SCAFO, DEFENDANT

January 18, 1973

Appearances:

HON. ROBERT A. MORSE, United States Attorney, Attorney for United States of America, By: PAUL D. LAZARUS, ESQ., THOMAS R. PATTISON, ESQ., Assistant U.S. Attorneys, of Counsel

DAVID M. MARKOWITZ, ESQ. and CONRAD FERRIGNO, ESQ., Attorneys for Defendant

JUDD, J.

MEMORANDUM, FINDINGS AND ORDER

A further hearing was held concerning defendant's motion to dismiss for failure of the government to comply with the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (the Speedy Trial Rules). The United States Court of Appeals in its decision of December 20, 1972, remanded the case for findings of fact on the excuses for delay.

The original hearings on the motion to dismiss having been held before the undersigned in Miscellaneous Part in August 1971, and the trial having been held and the judgment of conviction entered by Judge Dooling, to whom the case was assigned under the Individual Assignment System, it was agreed between the Judges that the undersigned should hold a hearing and make the findings requested by the Court of Appeals.

There was a delay between arrest and indictment which extended 24 days beyond the period specified in the Speedy Trial Rules. At the original hearing, the 24 day excess delay was treated as *de minimis*, coming at the outset of a new procedural regime.* The decision was rendered before Judge Costantino's decision in *United States* v. *Kaye*, 334 F.Supp. 326 (E.D.N.Y. October 8, 1971), where there had been almost a month of excessive delay and he treated the time requirements as inflexible. The Court of Appeals has now directed that findings of fact be made so that if the motion is again denied, that Court can properly review the propriety of the denial.

*The Evidence*

Defendant Joseph Scafo and one Leonard Turano were arrested in August 1969 for the theft of two cartons from the "value cage" at John F. Kennedy

* The hearing directed by the Court of Appeals took about two hours. Preparation for the hearing, study of the record and briefs, and drafting and revision of this memorandum and findings required in the aggregate more than another full court day, while decision of civil matters was delayed.

International Airport, one containing watches from Italy and one containing pearls from Japan. Both men were arraigned before one of the United States Commissioners, waived preliminary hearing, and were released on their own recognizances. Mr. Turano had given a statement to F.B.I. agents, admitting his complicity in the theft. Turano had been Scafo's supervisor at the American Airlines Cargo Terminal, and had seen Scafo with the packages and received some of the proceeds.

The matter remained dormant until March 1971, after the announcement of the Speedy Trial Rules.

In early March 1971, the matter was assigned to Assistant United States Attorney Thomas R. Pattison. He had not been appointed an Assistant until several months after the arrests were made. The matter was originally assigned to Assistant United States Attorney Soicher, who had resigned.

Mr. Pattison testified on the basis of his recollection, as reinforced by an affidavit which he had made on August 20, 1971 in opposition to the motion to dismiss. He said that he had three or four 'phone talks with Mr. Markowitz, the attorney who represented Mr. Scafo at his arraignment, concerning a possible plea of guilty. Mr. Markowitz stated that he would recommend a plea of guilty to a misdemeanor—which would be based on placing a value of less than $100 on the goods stolen. 18 U.S.C. § 659. Mr. Pattison said initially that this would not be acceptable.

Mr. Pattison next communicated with Joseph Fallek, Turano's attorney, but not until May. Mr. Pattison had assumed that Turano, who had turned back most of the money he received from the theft, would be a willing witness. Mr. Fallek was in Mr. Pattison office twice and Mr. Turano was there once, and there were two or three telephone conversations with Mr. Fallek. By June it became clear that Turano would not agree to testify. Although he might plead guilty to a misdemeanor count, he expressed fear for his safety if he testified. Mr. Pattison thereupon called Mr. Markowitz and said that he would make a misdemeanor plea available. Mr. Markowitz then was not sure whether his client would plead guilty, but promised to call back. He did call back, in three or four weeks according to Mr. Pattison's recollection, saying that his client would not plead guilty but would waive a grand jury indictment. Mr. Pattison responded that the policy of the office was not to accept a waiver of grand jury indictment in a felony case unless it was to be followed by a guilty plea, and that he would present the matter to the grand jury.

During the early stages of the case, Mr. Pattison had some doubt as to which of the two men was the prime mover in breaking into the value cage, and whether Turano might have been playing down his own role. He believed that it would be difficult to convict Scafo without Turano's testimony, and that he should not seek an indictment without having Turano's testimony under oath, since his written

statements to the F.B.I. agent would not be admissible in court against Scafo.

After several conversations with Mr. Fallek, an agreement was reached on July 27 that Turano would be a witness and would plead guilty to a misdemeanor. His plea to such a misdemeanor information was entered before Magistrate Schiffman on July 28, after he signed a waiver of his right to trial before a district judge and a jury. The information (71-CR-792) had been filed on July 2, 1971. Mr. Turano went before the grand jury on the morning of July 29. In the afternoon he appeared before Magistrate Schiffman, who suspended imposition of sentence and placed him on probation for two years. The court has reviewed the official docket sheet in the Turano matter, as well as Turano's trial testimony.

In the August 1971 hearing on defendant's motion to dismiss, Mr. Pattison mentioned that there was another witness, and that "the prosecution will not hurriedly bring a charge against a man unless it is sure, first of all, that it is right." Mr. Pattison testified at the latest hearing that the witness involved was Mr. Turano, but that he did not give his name at the August hearing, because of Turano's statement that there had been telephone threats to deter him from testifying. Mr. Pattison had tried not to let the lawyers for either of the two defendants know of his conversation with the other lawyer. He did not apply for an extension of the six-month period before the indictment, in the belief that the application would have to be on notice and that the

disclosure of the reason for delay might endanger Turano.

Mr. Pattison made no notes of the telephone calls concerning which he testified. He could have obtained a grand jury indictment on the basis of the F.B.I. agent's hearsay testimony as to what Turano had said, but this procedure would have involved a risk of having to drop the indictment if Turano persisted in his refusal to testify.

Mr. Markowitz testified that he kept a docket sheet on each case with a list of all activities and telephone calls on the matter, which he or his secretary filled in whenever there was a telephone call, that his first call from Mr. Pattison was on March 17, 1971, and that Mr. Markowitz had offered to waive indictment as early as March 26, 1971. He said his only other call from Mr. Pattison was on July 28th, when Mr. Pattison said he would take a plea to theft of goods valued under $100, and was going to the grand jury.

The entries on his docket sheet during the time before the case was set for trial are as follows:

| | |
|---|---|
| 8-19-69 | client—see sheet |
| 29 | letter to U S Atty |
| 3-17-71 | Mr. Pattison spoke to me |
| 19 | letter to client |
| 24 | call Joseph Fallek |
| 24 | parties in |
| 26 | called Pattison OK to waive Ind |
| 6-14 | Larry in with papers |

| | |
|---|---|
| 8-10 | file petn for remission of prf— |
| 6-21 | letter to customs |
| 7-28 | Mr. Pattison called—will take plea |
| | Theft of goods—value under 100—going to G J |
| 8- 5 | letter from U S Atty—indicted—pleadg 8/12 |
| 5 | letter to client—appt 8/10 |
| 10 | client in |
| 16 | served motn ret 8/20 PL 8 |
| 20 | aff in oppostn— |
| 20 | on cal Judge Judd—motion denied |
| 11- 1 | letter re conference Judge Dooling 11/19 3:20 p |
| 1 | letter to client |
| 11-19 | appeared at conference see sheet 1/24 Trial |

The docket entries include only the major substance of a call, according to Mr. Markowitz.

Mr. Markowitz said that his telephone conversation of March 24th with Mr. Fallek was "evidently to find out if it is all right with him to waive the indictment too." He did not testify concerning the conference on that day indicated by the entry "parties in."

No evidence was presented of any prejudice to the defendant from the delay in filing the indictment. In

fact, Mr. Markowitz learned some of the government's evidence from Mr. Pattison during the pre-indictment discussions.

*Discussion*

Mr. Markowitz' entries are inconsistent with Mr. Pattison's testimony as to dates, but not as to substance.

Mr. Markowitz' docket sheet is sketchy, and quite possibly incomplete. In a busy office, a system that depends on getting out the file and making an entry of each telephone call or transaction, is easily susceptible to omissions.

The entry on March 26th "called Pattison OK to waive Ind." is obviously shorthand for some other idea, because no waiver would be necessary if there was a plea to a misdemeanor, and Mr. Markowitz did not suggest that he ever offered to have his client plead guilty to a felony. Assuming that the entry means that Mr. Markowitz offered to have his client plead guilty to a misdemeanor, the entry is consistent with Mr. Pattison's testimony that he was unwilling at the time to accept a plea to a misdemeanor.

The subsequent entries of 6/14 "Larry in with papers" and 6/21 "letter to customs" are consistent with Mr. Pattison's statement that some time in June he talked with Mr. Markowitz, although Larry was not identified by Mr. Markowitz. The authenticity of the entire docket sheet is placed in doubt by the entry "8/10 file petn for remission of prf," which is out of place and unexplained—but the court will treat

the exhibit as authentic, although not necessarily complete.

The entry of July 28, "Mr. Pattison called—will take plea Theft of goods—value under 100—going to GJ" is consistent with Mr. Pattison's testimony that he finally offered to take a misdemeanor plea, and that Mr. Markowitz was unwilling then to have his client plead guilty. Mr. Markowitz' refusal to have his client plead guilty would explain Mr. Pattison's statement that he was going to the grand jury.

*Law*

The one and a half years which intervened between the arrest and the date of the Speedy Trial Rules do not show a violation of defendan'ts constitutional right to a speedy trial and need not be counted. *United States* v. *Lustman*, 258 F.2d 475 (2d Cir.), cert. denied, 358 U.S. S80, 79 S.Ct. 118 (1958); *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972); *United States* v. *Saglimbene*, —— F.2d ——, (2d Cir. Dec. 26, 1972); *United States* v. *Fasanaro*, —— F.2d ——, (2d Cir. Jan. 2, 1973). The indictment was well within the five-year period permitted by the statute of limitations. 18 U.S.C. § 3282.

The Speedy Trial Rules list eight categories of periods that may be excluded from the six-month computation. All the exclusions except paragraph (h), "Other periods of delay occasioned by exceptional circumstances," relate basically to delays of trial after the indictment or information is filed. Courts are not as familiar with proceedings between arrest and

indictment or information as they are with subsequent proceedings, but there surely may be justifiable delays before as well as after indictment or information. This case suggests that there are several reasons for delay between arrest and indictment which could properly be excluded from the six-month computation.

When a defendant has been released after a mere arrest, the anxiety and possible prejudice which he suffers are different both in degree and in kind from those which exist while awaiting trial after an information or indictment.

In this case the court may properly consider the time necessary after January 5, 1971 to review open matters and reassign those not presently in the hands of an Assistant, the time necessary to confirm or corroborate the evidence on which the arrest was based, analogous to Rule 4(c), and the time necessary to determine the treatment to be accorded a person arrested for the same offense, analogous to Rule 4(c).

The probable cause necessary for an arrest is quite different from the requirement of proof beyond a reasonable doubt which must be presented to a petit jury. One may be established by affidavits, but the other requires living witnesses in court. A missing witness justifies appropriate delay. *Barker* v. *Wingo*, *supra*, 407 U.S. at 531, 92 S.Ct. at 2192. An unwilling witness is comparable to a missing witness as an obstacle to prosecution.

There were some periods when more expedition might have been possible, but the case was presented

to the grand jury the day after Mr. Turano pleaded guilty. The case should not be judged as if an Assistant United States Attorney must devote all his time to this one matter.

It is not necessary to read Rule 4 as requiring that there be an application for an extension of time before the expiration of the basic six-months period. Rule 5 refers in paragraphs (b) and (c) to the granting of a continuance, which is appropriate primarily when there is a case pending in the court. The Judicial Council would probably have given clear expression of its intention to require formal application for an extension of time if that had been its intent. The time requirement of the Speedy Trial Rule should not be subject to a stricter application than the criminal Rules themselves, where an extension of time after the expiration of the period is permitted by F.R.Cr.P. 45(b) in case of "excusable neglect."

The circumstances of this case are exceptional in several respects, starting with the fact that the case reflected the impact of new Rules. While the Judicial Council said that the period from January 5 to July 5, 1971 "should provide sufficient time for the United States Attorneys to determine which cases should be reached for trial and which cases should be discontinued," this statement should not prevent a showing of the need for more time in individual cases.

In view of the many offenses committed at John F. Kennedy International Airport, this court does not consider it in the public interest to dismiss charges of theft at the airport unless they are truly trivial or

the delays are clearly inexcusable or there has been real prejudice to the defendant as a result of the delay.

*Findings and Conclusions*

The court FINDS:

1. That the charges against defendant Joseph Scafo and Leonard Turano were reassigned to Assistant United States Attorney Pattison on about March 17, 1971.

2. That the delay of a little more than two months after January 5, 1971 in making the reassignment was caused by exceptional circumstances, namely, the impact of the new Rules and the resignation of the Assistant who previously had the case, and that this period should be excluded from the six-months computation.

3. That a reasonable period to explore the possibility of a guilty plea by defendant Scafo should be excluded from the six-months computation: and in this case, that a period of one month should be allowed for that purpose.

4. That a reasonable period to prepare the government's case should also be excluded, particularly in view of (a) the importance of Leonard Turano's testimony for the government, (b) his assertion of fears which deterred him from cooperating, and (c) the necessity of reaching a judgment as to whether it was sound policy to let him plead guilty to a misdemeanor; and that a period of at least sixty days should be allowed for this purpose.

5. That all the periods mentioned should be treated as excusable delay, occasioned by exceptional circumstances, outside the six-month period.

6. That the delays in prosecution did not prejudice the defendant.

The court CONCLUDES that there was no violation of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases or of the defendant's constitutional rights, and that the delay between arrest and indictment was justified by exceptional circumstances.

Judge Dooling having heard the trial evidence and imposed the sentence, the entry of a new judgment will be left for him.

It is ORDERED that the motion to dismiss the indictment be denied, and that the case be referred to Judge Dooling for resentence.

/s/ ORRIN G. JUDD
U.S.D.J.

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-1653

HONORABLE JOHN F. DOOLING, JR., UNITED STATES DISTRICT JUDGE, PETITIONER

*v.*

JOHN HILBERT, III

---

No. 73-258

UNITED STATES OF AMERICA, PETITIONER

*v.*

JOSEPH SCAFO

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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**REPLY MEMORANDUM FOR THE UNITED STATES**

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The government has asked the Court to review these two cases because they raise the important question of criminal law enforcement whether the Judicial Councils or the districts courts have authority to promulgate rules requiring dismissal with prejudice of indictments because of prosecutorial delays not involving denial of the right to a speedy trial

guaranteed by the Sixth Amendment. The Court of Appeals for the Second Circuit, contrary to the views of all other circuits, has adopted and approved rules requiring such dismissal. Respondents do not seriously deny the importance of the issue or make any convincing showing that the decisions of the Second Circuit in these two cases are sound. Rather, they raise a series of technical objections which, they contend, make these cases inappropriate vehicles for deciding the issue, and also argue that these decisions "will have a minimum effect, if any, on matters now pending in the District Court" (Seafo Opp. 5; Dooling Opp. 2–3).

The issue that these petitions present is an important and major one that requires resolution by this Court. Respondents' attempts to avoid the issue are unconvincing.

1. Both respondents seek to minimize the impact of the Second Circuit's Speedy Trial Rules, upon which the dismissals here were predicated, on the ground that those rules have now been superseded by local district court rules issued pursuant to Rule 50(b), Fed. R.Crim.P.

But neither respondent denies that the Rule 50(b) plans adopted by the district courts in the Second Circuit are substantially similar to the Speedy Trial Rules involved in the present cases. Both mandate dismissal for delay based on the passage of an arbitrary period of time, without regard to a demand for a speedy trial or prejudice to a defendant's ability to defend himself (Dooling Pet. 24). Indeed, the basic

similarity of the Circuit Council Rules and the Rule 50(b) plans recently caused the court of appeals to observe that, "although this case [involving a dismissal of an indictment] is governed by the prior Prompt Disposition Rules, the decision bears also on the proper interpretation of the District Plans." *United States* v. *Lasker*, Nos. 73-1370, 73-1102—73-1108, decided June 11, 1973 (C.A. 2), slip op. p. 4115, n. 1.[1]

While the petitions may appear also to challenge the power of the Circuit Council to exercise any rule-making authority under 28 U.S.C. 332, the purpose of that discussion was to demonstrate how far the Circuit Council had exceeded its proper function here in legislating a rule which not only grants unprecedented authority to the district courts, but is wholly at odds with Rule 48(b), Fed.R.Crim.P., which this Court adopted with the concurrence of Congress and which has the force and effect of law (18 U.S.C. 3771).

But whatever power the Circuit Councils (as well as the district courts under Rule 50(b)) may have to promulgate procedural rules to speed the consideration and determination of criminal cases, that power

[1] The statement in the majority opinion in *Dooling* (Pet. App. A, p. 3a), cited by Hilbert (Opp. 3), that "[t]he importance of the issue has been somewhat diminished as a result of the recent adoption * * * of new [Rule 50(b)] rules," refers solely to the issue whether in fact the Circuit Council Rules compelled dismissal with prejudice (Dooling Pet. App. A. pp. 2a-3a). We agree that the importance of this issue of construction—which we do not raise here—has been diminished by the adoption of the Rule 50(b) plans, which expressly compel dismissal with prejudice (Dooling Pet. App. G. pp. 45a–46a).

is subject to certain limitations. Since the exercise of these rule-making powers is not subject to prior congressional approval—as is the case when this Court promulgates rules (18 U.S.C. 3771)—the rule-making power must be exercised in a manner "not inconsistent with the statutes [including rules promulgated by this Court] or constitution of the United States." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9–10; 28 U.S.C. 2071. As the Court of Appeals for the Third Circuit recently held in sustaining the rule-making power of the Circuit Councils:[2]

> Nor do we accept appellant's contention that a judicial council lacks rule-making power. His argument that this would destroy uniformity flies in the face of the fact that every court of appeals, not to mention many district courts, has its own local rules. *The caveat is that such rules must not conflict with rules that have been made effective nationally.* See *In re Mandell*, 2 Cir., 1934, 69 F. 2d 830. [Emphasis supplied.]

The same limitations apply to the rule-making functions delegated to the district courts pursuant to Rule 39(b).

2. Respondent Hilbert argues, however, that the Circuit Council Speedy Trial Rules and the Rule 50(b)

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[2] *In the Matter of Imperial "400" National, Inc.* v. *Nalco*, Nos. 72–1566 and 72–1920 (C.A. 3), decided April 23, 1973, petition for certiorari pending (No. 73–204). The portion of the opinion quoted above appears at p. A–11 of the Circuit Council's petition for certiorari.

plans adopted by all the district courts within the Second Circuit are not inconsistent with Rule 48(b) of the Federal Rules of Criminal Procedure.

He claims first that Rule 48(b) is not breached by a rule compelling dismissal with prejudice because Rule 48(b) "permits dismissal with or without prejudice" (Dooling Opp. 4).[3] We did not, however, suggest that Rule 48(b) precludes dismissals with prejudice. We

[3] Hilbert also takes comfort from the fact that the Circuit Council Rules were cited "favorably" in *Barker* v. *Wingo*, 407 U.S. 514 (Dooling Opp. 4), and in the reference to those rules in the Advisory Committee Notes accompanying Rule 50(b) (Dooling Opp. 7). But it was not until after *Barker* was decided and Rule 50(b) was promulgated that the Second Circuit in *Hilbert* v. *Dooling* "announced that dismissals under Rule 4 are with prejudice" (*United States* v. *Rollins*, 475 F. 2d 1108, 1109 (C.A. 2)). Since the Circuit Council's rule did not state that dismissal with prejudice was mandatory, and since the Chief Judge of the Circuit and the able district court judge in *Hilbert* v. *Dooling* did not so read the Council rules, it is difficult to see what satisfaction Hilbert derives from the citation of the rules in *Barker* and the Advisory Committee Notes. Moreover, the Model Plan, which was prepared and circulated by the Judicial Conference and adopted by most district courts (Dooling Pet. 22-23, n. 13), expressly rejects dismissal as a remedy for noncompliance, and this Court in *Barker* did not purport to decide the validity of the Circuit Council rules, it expressly stated that a dismissal for delay in prosecution was an "unsatisfactorily severe remedy" (407 U.S. 522). Such a dismissal is justified only in the case of a violation of the Speedy Trial Clause, because "such severe remedies are not unique in the application of constitutional standards" (See *Strunk* v. *United States*, No. 72-5521, decided June 11, 1973, slip op. p. 6). Here, of course, it is not alleged that the Speedy Trial Clause was violated.

urge rather that such dismissals are justified only upon a showing that the Speedy Trial Clause has been violated or that a trial would be incompatible with due process because of the delay. Hilbert cites no authority, other than the holding below, which supports a dismissal with prejudice in any other instance. On the contrary, the cases in every circuit—including the Second Circuit—hold otherwise (Dooling Pet. 19-20).

Hilbert next suggests that the Second Circuit's mandatory dismissal rule does not interfere impermissibly with the discretion of the district court under Rule 48(b) because that discretion is limited by the Circuit Council's rules only "when the Government fails to explain why a delay in prosecution of more than six months is not an 'unnecessary delay'" (Dooling Opp. 5). This contention turns Rule 48(b) on its head. The rule, by its terms, is addressed solely to the situation in which there *has been* an unnecessary delay and does not otherwise contemplate dismissal of prosecutions. The discretion to dismiss thus arises only upon a finding of unnecessary delay—and inherent in the existence of "discretion" to dismiss must be a similar "discretion" not to dismiss (unless there has been a "speedy trial" violation of constitutional dimensions).

The extent to which that discretion has been interfered with is demonstrated in *Scafo*. There, despite the district court's finding that "this court does not consider it in the public interest to dismiss charges

of theft at the airport unless they are truly trivial or the delays are clearly inexcusable or there has been real prejudice to the defendant" (Scafo Pet. App. D, pp. 34a–35a), the court of appeals applied its mandatory dismissal rule simply because more than six months had elapsed from the date of arrest.

More significantly, Hilbert's suggestion that, in order to *avoid* dismissal under Rule 48(b), the government must explain why a particular delay is not an unnecessary delay, likewise ignores the holding of every other circuit that in order to *justify* a dismissal—particularly where, as here, no demand for a speedy trial was made or required[4]—there must be a showing that the delay was either deliberate and oppressive or that the defendant was prejudiced (Dooling Pet. 19). Here there was no demand for a speedy trial, no deliberate or oppressive delay, no prejudice to the respondents' right to a fair trial, and no basis for a dismissal under Rule 48(b) or the Sixth Amendment. If, therefore, as the court of appeals held (Dooling Pet. App. A, p. 15a) and Hilbert suggests, all that is involved is a construction of Rule 48(b), then there is a conflict among the courts of appeals which should be resolved.

3. Our petition for certiorari in *Scafo* (Pet. 12–13) also notes that the issue raised here is of immediate

[4]Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 8 (Dooling Pet. App. E, p. 33a); Plan for Achieving Prompt Disposition of Criminal Cases, Rule 7 (Dooling Pet. App. G, p. 48a).

practical concern because of the interpretation which *Scafo* and other cases placed on both the Circuit Council Speedy Trial Rules and the Rule 50(b) plans. These cases hold that a notice of readiness is an essential prerequisite to compliance with those rules (Scafo Pet. App. A, pp. 14a–15a). As we represented in *Scafo,* this holding will affect approximately 271 cases in the Eastern District of New York, where until recently it was not the *uniform* practice of the United States Attorney's Office to file a notice of readiness. The likelihood of a dismissal with prejudice, we noted, will encourage numerous motions to dismiss by defendants who took no action to demand a speedy trial. This in turn will involve numerous time-consuming hearings[5] and may ultimately result in the freeing of scores of defendants for reasons wholly unrelated to their guilt or innocence or their ability to obtain a fair trial.

Respondent Scafo claims that this representation is not correct because in *United States* v. *Pierro,* 478 F. 2d 386 (C.A. 2), "the United States Court of Appeals applauded the United States Attorneys Office

[5] In discussing the nature of the hearing held in *Scafo,* the district court observed (Pet. App. D, p. 25a, n.):

"The hearing directed by the Court of Appeals took about two hours. Preparation for the hearing, study of the record and briefs, and drafting and revision of this memorandum and findings required in the aggregate more than another full court day, while decision of civil matters was delayed."

Moreover, even the filing of a timely notice of readiness apparently does not preclude a defendant from obtaining a hearing as to whether the United States Attorney was in fact ready for trial. *United States* v. *Pierro,* 478 F. 2d 386, 388, n. 2 (C.A. 2).

for the Eastern District for adopting a position of issuing a Notice of Readiness" (Scafo Opp. 6). But this policy was not adopted on a mandatory basis until March 1973, when the Court of Appeals first intimated that only "exceptional circumstances" could justify "the Government's failure to file a notice of readiness." *United States* v. *Rollins*, 475 F. 2d 1108, 1111 (C.A. 2). Until then, there had been no indication that a communication of readiness was essential to compliance with either the Circuit Council Rules or the Rule 50(b) plans.[6]

4. In our petition in *Scafo*, we observed that the appeal which led to the dismissal of the indictment in that case was argued and decided after the court of appeals, sitting *en banc* in *Hilbert* v. *Dooling*, had construed the Speedy Trial Rules to compel a mandatory dismissal and had sustained their validity.

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[6] It is true, as Scafo notes (Opp. 7), that "a written notice of readiness" is not essential and that an oral communication of readiness will apparently suffice. But while an "oral notice of readiness" at the time of arraignment is the accepted practice in district courts outside the Eastern and Southern Districts of New York, "where the caseload is relatively less burdensome" (*United States* v. *Pierro*, *supra*, 478 F. 2d at 389, n. 3), such a practice was not employed in the Eastern District where defendants are normally arraigned before a "miscellaneous judge," who sets bail and appoints counsel. Only after arraignment is the case automatically assigned to a district judge for trial. Although it is not inconceivable that an oral notice may have been given in some of these 271 cases, the United States Attorney advises us that the principal method of communicating readiness for trial was by written notice and that the "oral notice of readiness" exception will not save a substantial number of the 271 cases in which no written notice was filed.

Accordingly, the same issue was not raised again when the appeal in the instant case was heard by the court of appeals. Respondent Scafo argues, however, that the United States is precluded from raising the issue here because, on the first appeal by Scafo from the judgment of conviction, it had not expressly challenged the validity of the Second Circuit's rules as an alternative ground for affirmance. In addition to this claim, which is unsupported by the meager authority cited by Scafo, he alleges that the failure to raise the issue on the second appeal—which resulted in the decision below—likewise precludes the United States from raising the claims here.

The principle that this Court ordinarily will not consider issues not raised below is a doctrine of judicial administration. It is a discretionary principle, not an immutable rule. The decision whether to apply it in a particular case rests in the sound discretion of this Court. The policy considerations underlying the principle are inapplicable in this case, where the court of appeals *en banc*—albeit in a previous case—had expressly considered and rejected the government's arguments, and where it would have been fruitless to have raised the issues in this case either on the first or second appeal. Under these circumstances, given the benefit of the court of appeals' reasoning on this issue and a clear record which requires no additional findings of fact, there is no basis for arguing that the issues should not be considered by this Court. See *Silber* v. *United States*, 370 U.S. 717; *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 412; cf.

*Blonder-Tongue* v. *University Foundation*, 402 U.S. 313, 320–321, n. 6.

## CONCLUSION

These cases present important questions of constitutional law and criminal law administration which this Court should decide. The petitions for writs of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

SEPTEMBER 1973.

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